Neutral Citation Number: [2014] EWCA Civ 39

Case No: A2/2013/0952

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mrs. Justice Sharp DBE
[2012] EWHC 3721 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 January 2014

Before :

LORD JUSTICE MAURICE KAY
(Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE LLOYD JONES

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Between :

ANDREW JAMES MILLER	**Claimant/ Respondent**
- and -	
ASSOCIATED NEWSPAPERS LTD	**Defendant/ Appellant**

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Mr. Mark Warby Q.C. and Mr. Adam Speker (instructed by **Reynolds Porter Chamberlain LLP**) for the **appellant**
Mr. Manuel Barca Q.C. (instructed by **Simons Muirhead & Burton**) for the **respondent**

Hearing dates : 10th & 11th December 2013

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Approved Judgment

Lord Justice Moore-Bick :

1. This is an appeal against the order of Sharp J. (as she then was) giving judgment for the respondent, Mr. Andrew Miller, against the appellant, Associated Newspapers Ltd, the publishers of the *Daily Mail*, in an action for libel. The words complained of formed part of an article published in the newspaper on 2nd October 2008, which raised questions about the conduct in 2002 of the then Deputy Metropolitan Police Commissioner, Sir Ian Blair, in connection with the award to Mr. Miller's company, Impact Plus Plc, of contracts to provide consultancy services to the Metropolitan Police Service ("MPS") and about Mr. Miller's willingness to benefit from his friendship with Sir Ian.

Background

2. At the time in question Mr. Miller was the founder and managing director of Impact Plus, a successful information technology and management consultancy company. By 2000 the company had provided consultancy services to various public bodies, including MPS, with which it was keen to do more business. Among other services Impact Plus offered a system called 'Programme Conscience', the purpose of which was to act as the 'eyes and ears' of senior managers responsible for delivering complex programmes, some elements of which required a technical competence outside their personal experience. By 2000, when Sir Ian (now Lord) Blair was appointed Deputy Commissioner of the Metropolitan Police, he and Mr. Miller had already been close friends for a long time. Some time before Sir Ian's appointment as Deputy Commissioner MPS had initiated an ambitious and very expensive programme to replace the existing infrastructure of both its urgent and non-urgent telephone call system. It was known by the acronym C3i and was originally a Private Finance Initiative ("PFI") project. The programme was large and complex and contained a substantial information technology component. It required careful and well-informed management by the person at MPS responsible for its delivery.

3. On his appointment as Deputy Commissioner in February 2000 Sir Ian Blair became senior responsible officer for the C3i programme. As a result of other work he was doing for MPS Mr. Miller had heard that the C3i programme was running into serious difficulties and on a social occasion soon after Sir Ian's appointment he mentioned that overseeing the programme might present some major problems.

4. One of Mr. Miller's roles as managing director of Impact Plus was to generate new business for the company and for that purpose he arranged meetings with representatives of organisations which might wish to make use of its services. The company had previously done work for MPS and he wished to promote its position. Accordingly, in 2000 he arranged a meeting with Ms Ailsa Beaton, who was then deputy senior responsible officer for the C3i programme. In the course of their conversation Mr. Miller mentioned that he was a friend of Sir Ian, a remark which she took as an attempt by him to influence her in his favour, but which he later said in evidence was made in the interests of transparency.

5. In 2001 C3i changed its status from a PFI programme to one owned by MPS. In or about September 2002 Sir Ian telephoned Mr. Miller to tell him that he wanted to appoint a consultant to provide support and advice in connection with managing the C3i programme. He said that invitations to tender would be sent out to selected

organisations, including Impact Plus. In due course on 28th October 2002 invitations to tender were sent to four companies, one of which was Impact Plus. Tenders were required by 7th November 2002. In the event only two of the four, Impact Plus and Willis Risk Management ("Willis"), submitted bids.

6. When Impact Plus examined the invitation to tender it did not think that the specification was adequate to provide the degree of support that would be needed and it was minded to offer a more extensive schedule of work. The invitation to tender stated that any enquiries should be directed to Andy Kinch, a member of the MPS Procurement Department, but instead of speaking to Mr. Kinch Mr. Miller decided to go straight to the top. He telephoned Sir Ian Blair in order to seek his approval for the submission of a modified bid. Sir Ian referred him to Mr. Steve Atherton, the Procurement Director, who gave his approval after discussing the matter on two occasions with Mr. Martin Samphire, another director of Impact Plus. As a result Impact Plus submitted a tender which provided for more extensive consultancy services than had been requested in the invitation to tender. In the body of the tender was a note explaining that it had been "informed by discussions between the MPS Deputy Commissioner, the MPS Director of Procurement [Mr. Atherton] and Mr. Miller." The tender submitted by Willis was limited to the work set out in the tender specification.

7. On 12th November 2002 the two tenders were reviewed by Mr. Atherton, who had some criticisms of both: he thought that the bid from Willis "failed to demonstrate added value and intellectual input", while that from Impact Plus was "significantly over-engineered and difficult to support in terms of value". In the end he suggested to Sir Ian that he meet both suppliers to explore the shortcomings of their respective proposals.

8. Meetings with the two suppliers were arranged for 28th November (Willis) and 3rd December 2002 (Impact Plus). On 25th November Sir Ian Blair spoke to Mr. Miller and said that he should attend the meeting with Impact Plus. The next day he wrote to the Treasurer of the Metropolitan Police Authority (the body responsible for regulating the MPS), Mr. Peter Martin, to inform him that he was seeking to appoint a consultant to help him monitor the C3i programme. In his letter he explained that there were two candidates, one of which, Impact Plus, was run by a friend of his, Mr. Miller. On a copy of that letter which was sent to Mr. Atherton Sir Ian noted that he had spoken to Mr. Miller the day before, suggesting that he attend the meeting. Sir Ian was present at both meetings and following an assessment of the rival presentations by Ms Beaton, Mr. Atherton and Sir Ian the contract was awarded to Impact Plus.

The publication

9. On 2nd October 2008 the Daily Mail published an article carrying the headline "Met Boss in new 'Cash for a Friend' Storm". It is unnecessary for the purposes of the appeal to set the article out at length (it can be found quoted in full in the judgment below), because on 11th November 2011 Tugendhat J. delivered a judgment in which he determined the meaning of the words which form the basis of the claim. He held that they meant that at the date of publication there were reasonable grounds to suspect that Mr. Miller was a willing beneficiary of improper conduct and cronyism because of his friendship with Sir Ian Blair in respect of the award of a number of

Metropolitan Police Service contracts to Mr. Miller's company worth millions of pounds of public money. He also held that the article was defamatory.

The proceedings below

10. The remainder of the case was tried by Sharp J. over five days in May 2012. In its defence the appellant had asserted that the substance of the article was true and (in the alternative) that the proceedings were an abuse of process. Those were the two main issues for determination at the trial, apart from the question of damages, if the claimant were successful. The judge held that the defence of justification had not been made out, rejected the submission that the proceedings were an abuse of the process and awarded Mr. Miller £65,000 in damages.

The appeal

11. The appellant seeks only to challenge the judge's decision on justification. Mr. Warby Q.C. submitted that in reaching her decision the judge had made a number of important errors. In summary, he said that she had failed to identify correctly what the appellant had to prove in order to succeed in its defence, had failed to take into account important parts of the evidence, had taken into account matters that were irrelevant, had made serious errors in her approach to the evidence, particularly the hearsay evidence, and had been inconsistent and unfair in her approach to the evidence generally. Before turning to consider those submissions it is necessary to refer briefly to the nature of the imputation and to the principles which apply to establishing a defence of justification in cases of this kind.

12. The words complained of in this case contained what is commonly known as a '*Chase* Level 2' imputation, that is, an implied statement that there were *reasonable grounds for suspecting* that Mr. Miller was a willing beneficiary of cronyism and improper conduct on the part of Sir Ian Blair, not that he was *in fact* willing to benefit from such conduct, much less that he had actually done so. Since it is no defence to an allegation of that kind to prove that others had formed such a suspicion, the sting of the imputation is that the claimant has by *his own conduct* brought such suspicion upon himself: see *Shah v Standard Chartered Bank* [1999] Q.B. 241, at page 261B per Hirst L.J. This is what has become known as the "conduct rule", namely, that in order to succeed in a defence of justification the defendant must prove conduct on the part of the claimant which, viewed in context, provides reasonable grounds for suspicion. As will become clear, the conduct rule assumed some importance in this case.

13. A convenient summary of the principles applicable to the justification of a *Chase* Level 2 imputation is to be found in the judgment of Brooke L.J. in *King v Telegraph Group Ltd* [2004] EWCA Civ 613, citing with approval a passage in the judgment of Eady J. at first instance. Although not all of the principles have a direct bearing on the present appeal, it may be helpful to set the passage out in full as follows:

> (1) There is a rule of general application in defamation (dubbed the "repetition rule" by Hirst LJ in *Shah*) whereby a defendant who has repeated an allegation of a defamatory nature about the claimant can only succeed in justifying it by proving the truth

of the underlying allegation – not merely the fact that the allegation has been made;

(2) More specifically, where the nature of the plea is one of "reasonable grounds to suspect", it is necessary to plead (and ultimately prove) the primary facts and matters giving rise to reasonable grounds of suspicion *objectively judged*;

(3) It is impermissible to plead as a primary fact the proposition that some person or persons (e.g. law enforcement authorities) announced, suspected or believed the claimant to be guilty;

(4) A defendant may (for example, in reliance upon the Civil Evidence Act 1995) adduce hearsay evidence to establish a primary fact – but this in no way undermines the rule that the statements (still less beliefs) of any individual cannot themselves serve as primary facts;

(5) Generally, it is necessary to plead allegations of fact tending to show that it was some conduct on the claimant's part that gave rise to the grounds of suspicion (the so-called "conduct rule");

(6) It was held by this court in *Chase* at [50] – [51] that this is not an absolute rule, and that for example "strong circumstantial evidence" can itself contribute to reasonable grounds for suspicion;

(7) It is not permitted to rely upon post-publication events in order to establish the existence of reasonable grounds, since (by way of analogy with fair comment) the issue has to be judged as at the time of publication;

(8) A defendant may not confine the issue of reasonable grounds to particular facts of his own choosing, since the issue has to be determined against the overall factual position as it stood at the material time (including any true explanation the claimant may have given for the apparently suspicious circumstances pleaded by the defendant);

(9) Unlike the rule applying in fair comment cases, the defendant may rely upon facts subsisting at the time of publication even if he was unaware of them at that time;

(10) A defendant may not plead particulars in such a way as to have the effect of transferring the burden to the claimant of having to disprove them.

What the appellant needed to prove

14. It was common ground that in order to succeed in its defence the appellant had to establish facts which, judged objectively, provided reasonable grounds for suspecting

improper conduct and cronyism on the part of Sir Ian Blair from which Mr. Miller willingly benefited. Mr. Warby was at pains to emphasise that it was unnecessary to prove actual misconduct on the part of Sir Ian or an actual willingness on the part of Mr. Miller to benefit from such behaviour, any more than that proof of innocence would have provided an answer to the accusation. It followed, in his submission, that it was irrelevant to consider Mr. Miller's actual state of mind, even though (as he accepted before the judge) a person's state of mind is a fact just as much as any other. Indeed, he submitted that the claimant's state of mind is not a matter that can be taken into account when deciding whether there are reasonable grounds for suspecting misconduct on his part. That, in his submission, reflected the essential distinction between *Chase* Level 1 imputations (guilt) and *Chase* Level 2 imputations (reasonable grounds to suspect).

15. This question assumed some prominence during the course of the argument, partly because the judge had made various findings about what had been going through the minds of Mr. Miller and others at Impact Plus at various times both before and during the tendering process. Mr. Warby submitted that those were not matters that the court could take into account; otherwise it would be too easy for a claimant to explain away after the event conduct that at the time appeared suspicious. In my view Mr. Warby was to some extent responsible for that particular turn of events, because he chose to cross-examine Mr. Miller extensively about his knowledge, beliefs and attitudes in relation to various aspects of the tendering process. It is hardly surprising, therefore, that the judge referred to that evidence and made some findings based on it. Nonetheless, I think there is some force in his submission, at any rate insofar as it relates to Mr. Miller's own evidence. It follows from what was said in *Shah* about the nature of a *Chase* Level 2 imputation, and from the fact that the existence of grounds for suspicion is to be judged objectively, that the question for the court when considering a defence of justification is whether, viewed at the date of publication, the claimant had behaved in a way that would give a reasonable person grounds for suspecting him of the wrongdoing in question. That much was not in dispute. Nor, subject to one point, was it in dispute that the reasonable person is to be taken to be aware of all the primary facts and matters subsisting at the date of publication: see *King*, principles (8) and (9). The allegation that the claimant has behaved in such a way as to bring suspicion on himself necessarily assumes the response of a reasonable person to observable primary facts. A person's conduct can be observed and assessed, but his state of mind cannot, except by inference from other, primary, facts. In my view, therefore, the claimant's subsequent account of what he thought, believed or intended, even though in one sense it is evidence of a fact subsisting before the date of publication, is not relevant, because it is not itself a primary fact for these purposes. If, however, it is possible to draw an inference about the claimant's state of mind at the time from other primary facts (e.g. that he was aware of a matter that was common knowledge), I see no reason why the reasonable person, or the court acting in that capacity, should not do so.

16. Mr. Warby's submission concerning Mr. Miller's evidence at trial about his state of mind at the time of the tender process naturally aligned itself with his submission that the court is not entitled to take into account events that occur after the date of publication – what he called 'the rule against hindsight'. One of his principal criticisms of the judge was she had failed to observe that rule. As a result, she had accepted from various witnesses, including Mr. Miller and Mr. Samphire,

explanations of their behaviour in connection with the tender process which tended to undermine the effect of conduct that would otherwise have given rise to grounds for suspecting a willingness to benefit from misconduct. In doing so she approached the matter as if the appellant had to establish actual impropriety and had imposed too stringent a test.

17. The complaint that the judge had failed to identify accurately the nature of the imputation rested principally on paragraphs 16 and 96 of the judgment in which she said:

> "16. In the context of this case, in my view Mr Barca is right therefore to submit that the need to prove reasonable grounds to suspect *actual* willingness/knowledge of such improper conduct and cronyism makes it particularly important to focus on what evidence the Defendant can properly adduce in support of a *Chase* level 2 meaning. (Original emphasis.)
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> . . .
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> 96. The Defendant suggested there was no need for either Mr Miller or Sir Ian Blair to be at the interviews, in particular when Ms Beaton and Ms Walker from the MPS were there to explore the technical issues, and commercial matters. I do not regard Sir Ian's presence as anything other than sensible for the reasons Ms Beaton and Ms Walker gave in their witness statements to the Flanagan Inquiry. Whoever won was required to work directly with Sir Ian Blair: and it was obviously important he could work with who was selected. Ms Beaton's professional view was that Sir Ian Blair had to be part of the assessment process as he had to be able to work with the people "in front of him." If Procurement had said "No" she would have accepted it, but at no time did Procurement express that view. Mr Miller said that on every other occasion when he had pitched for 'Programme Conscience' work, the SRO was always there: it would have been "utterly nonsensical for the SRO not to be present, because the consultancy in question reports to them and they must feel comfortable with the style of the people, with the competence of the people, with the personal chemistry, if you like, as well." As for his own presence, Mr Miller said he believed Sir Ian Blair wanted him there for transparency, and so his colleagues could see who they were dealing with. Mr Miller said from his perspective given the size and importance of the organisation it would have been discourteous for the managing director not to have been there"

18. Mr. Warby submitted that the reference in paragraph 16 to Mr. Miller's *actual* state of mind betrayed a confusion of thought and that in paragraph 96 she had made findings about the reasons for Mr. Miller's and Sir Ian Blair's presence at the meeting on 3rd December 2002 which tended to exculpate Mr. Miller but were not relevant to whether there were reasonable grounds for suspicion. He also relied on other passages in the judgment in which she made findings about what had been passing through Mr. Miller's mind at various times. All those passages, he suggested, showed that the judge was concentrating on whether Mr. Miller was *actually* willing to benefit from misconduct and cronyism rather than on whether the facts gave rise to reasonable grounds for *suspecting* that he was.

19. Those passages must, however, be read in context and in the light of the way on which the appellant presented the case at trial. As I have already mentioned, Mr. Warby had cross-examined Mr. Miller extensively about his reasons for his acting in different ways in the course of the tender process and it is no criticism of the judge that she discussed that part of the evidence. In two of the passages on which Mr. Warby focused criticism, paragraphs 20 and 21, the judge was discussing the extent to which Mr. Miller's explanations of his actions were relevant to the question whether the facts subsisting at the time of publication gave rise to a reasonable ground of suspicion. She said:

> "20. Though each case must obviously be judged on its facts, in my view there is no necessary unfairness in permitting a claimant to give such evidence. The assessment the court is asked to make when determining whether there were reasonable grounds to suspect is an objective one. The question is not whether it was reasonable to publish a particular defamatory allegation on the defendant's state of knowledge at the time of publication (an issue which could, depending on the circumstances, enable a defendant to rely on the defence of *Reynolds* privilege) but whether there were, objectively, on the true facts, reasonable grounds to suspect x y or z at the date of publication. . . .
>
> 21. Here it is an intrinsic part of the factual matrix relied on to support the Defendant's case on justification that Mr Miller <u>in fact</u> acted with a certain purpose, or intended certain consequences, and that the court can draw inferences from other facts as to his actual state of mind or state of knowledge. It seems to me that he is therefore entitled to give evidence pertaining to those issues, because it is relevant to the material factual position at the time . . ."

20. As I read those passages the judge was concerned to do no more than emphasise that a defence of this kind is to be determined objectively by reference to the facts at the date of publication. I agree with Mr. Warby that attempts by a claimant after the event to explain away his actions cannot help, but I can see no reason why evidence given at the trial which sheds light on matters that occurred before the date of publication

should be excluded just because it comes from the claimant, although that may be a reason for looking at it with some care.

21. The only other passage to which it is necessary to refer is to be found in paragraphs 73-74 of the judgment, in which the judge dealt with the argument that Sir Ian Blair had telephoned Mr. Miller for advice in September 2002 only because Mr. Miller had planted in his mind the idea that he would benefit from having a consultant to help him monitor the progress of the C3i programme. The judge did not accept that; she was satisfied that Sir Ian had called Mr. Miller of his own initiative in order to obtain advice. Mr. Warby submitted that once again the judge was directing her mind to the question of guilt rather than suspicion, but in my view all one sees there is the judge responding to the evidence and arguments that the appellant had put before her and explaining her response to the primary facts. In other words, she is explaining why those facts did not in her view support the inference being put forward by the appellant.

22. Notwithstanding Mr. Warby's submissions, I am not persuaded that this very experienced judge lost sight of the important distinction between *Chase* Level 1 and *Chase* Level 2 imputations. In paragraph 13 of her judgment she had reminded herself of the principles in *King* and in paragraph 14 she had reminded herself of the nature of the imputation in this case and of the 'conduct' rule as explained in *Shah*. In the light of those statements of principle she held that it was necessary for the appellant to establish the primary facts on which it relied; it was not, she said, sufficient for it to establish reasonable grounds to suspect the existence of such facts. In paragraph 16 of her judgment she referred expressly to the fact that the appellant need to prove *reasonable grounds to suspect* a willingness on the part of Mr. Miller to benefit from improper conduct and *reasonable grounds for suspecting* that he knew of such misconduct. The use of the word "actual" might, if taken out of context, appear unfortunate, but it is clear from the passage as a whole that the judge was directing her mind to the need to establish reasonable grounds for suspicion. It cannot be read as indicating that she was directing her attention to Mr. Miller's actual state of mind. The whole emphasis is on the need for the appellant to adduce evidence of conduct on the part of Mr. Miller sufficient to bring suspicion on himself, rather than relying on circumstantial evidence of a more general and unfocused nature.

Failure to deal with the evidence correctly

(i) Mr. Miller's evidence

23. I turn next to various criticisms made by Mr. Warby of the way in which the judge dealt with the evidence. The first was that she should not have relied on evidence from Mr. Miller about his state of mind from time to time during the course of the tender process. I have already dealt with this point. Although, with the benefit of hindsight, it might have been better not to allow Mr. Warby to cross-examine Mr. Miller about such matters, since Mr. Miller did give such evidence I am not surprised that the judge thought it appropriate to refer to it. As I have already said, however, I do not think that she allowed it to distract her from the critical question and I am not persuaded that it weighed significantly with her when she came to make her decision on it.

24. Mr. Warby submitted that because the judge went wrong on this point she failed to deal properly with the evidence of the name-dropping incident or the telephone conversation between Mr. Miller and Sir Ian Blair following the receipt by Impact Plus of the invitation to tender. However, I am unable to accept that. In paragraph 60 of the judgment, which contains one passage of which complaint is made, the judge records Mr. Miller's evidence as being that he mentioned his friendship with Sir Ian Blair to Ms Beaton in the interests of transparency. That is said to have been an example of exculpatory evidence given by Mr. Miller which the judge ought not to have taken into account. However, as I read it, she did not make a finding to that effect and even if she did, it is not clear how, if at all, it affected her decision. The evidence did not break what Mr. Warby called the "hindsight" rule, since it concerned facts in existence at the time of publication, but a finding to that effect would in my view have been irrelevant since it could not add to or detract from the observable conduct on which suspicion was said to be grounded.

25. Much the same can be said about the telephone call which Mr. Miller made to Sir Ian Blair following the receipt by Impact Plus of the invitation to tender, which is dealt with in paragraph 83 of the judgment. Mr. Warby submitted that the judge accepted Mr. Miller's explanation of events and relied on them to neutralise the inference that might otherwise have been drawn from them. I would accept that an account given by Mr. Miller at trial of his reasons for making that call does not help one decide whether his conduct was such as to bring suspicion on himself; on the other hand, in so far as his explanation shed some light on the circumstances surrounding the call and on ordinary business practice, it was capable of doing so. Apart from that, I am not persuaded that the judge did accept Mr. Miller's explanation or, more importantly, that she placed any reliance on it.

26. In paragraphs 82 and 83 of the judgment the judge summarised the evidence given by Mr. Samphire and Mr. Miller at the trial. She did not say in terms that she accepted what they said as true, but I am prepared to assume that she did so. Most of what they said was admissible since it described the circumstances under which the call to Sir Ian Blair seeking authorisation for the submission of a modified tender had been made. Insofar as Mr. Miller sought to explain his thinking at the time, the evidence was in my view irrelevant and inadmissible for the reasons given earlier, but since it had been given without objection is was appropriate for the judge to refer to it. I am not persuaded, however, that it affected her decision.

(ii) Reliance on hindsight

27. Mr. Warby's next criticism was that the judge failed to observe the rule against hindsight, to which I referred earlier. In my view this reflects some confusion of thought. It was not disputed that in seeking to make good its defence the appellant was entitled to rely on any relevant facts (including statements) in existence at the date of publication, but not on events occurring after that date. Most of the appellant's complaints under this head were, however, directed to explanations given in the course of the proceedings. As I have already pointed out, it is necessary to draw a distinction between events occurring after the date of publication and statements, whenever made, which tend to prove or disprove the existence of facts subsisting at the date of publication. The latter are admissible, but the former are not.

28. Mr. Warby identified five particular respects in which he submitted that the judge had broken the rule against hindsight. The first concerned Mr. Miller's evidence about the reason for his mentioning during his meeting with Ms Beaton in 2000 that he was a friend of Sir Ian Blair. Whether his state of mind at the time was or was not a relevant matter for the judge to take into account, it clearly pre-dated publication of the article and any criticism on the grounds of hindsight is therefore misplaced. The second related to the telephone conversation between Mr. Miller and Sir Ian in 2002, the so-called 'out of the blue' conversation. Again, that conversation and the events surrounding it all pre-dated publication of the article by a period of some years. Whatever Mr. Miller or others may have said by way of explanation of those events, they were speaking about facts already in existence at the date of publication. The same is true of the third matter of complaint (the explanation given by Mr. Miller for telephoning Sir Ian Blair direct in order to enquire whether a modified tender would be considered), the fourth (the explanation given by Mr. Miller of certain statements made in the tender submitted by Impact Plus) and the fifth (Mr. Samphire's views on the propriety of his and Mr. Miller's conduct). Whatever other objections might be made to the introduction of that evidence, it all related to matters that occurred well before the date of publication.

(iii) Reliance on lay opinion evidence

29. Mr. Warby's next point was that the judge wrongly relied on lay opinion evidence in the form of views expressed by Mr. Samphire, Ms Beaton and another employee of MPS, Miss Walker, in support of her conclusion that Mr. Miller had not acted improperly in relation to the tender process. In paragraph 99 of the judgment the judge summarised Mr. Samphire's evidence about the commercial background to tendering for projects such as providing consultancy support for the C3i programme. In my view there is no basis for criticism there. However, she also referred to the view he had expressed in evidence that Impact Plus had acted professionally and with complete integrity, evidence which the judge noted had not been challenged. I agree with Mr. Warby that Mr. Samphire's opinion on these matters was not relevant to the question the judge had to decide and that there was no need for the appellant to challenge it. I am not persuaded, however, that it significantly affected her decision.

30. The other respects in which the judge is said to have relied improperly on lay opinion in preference to documentary evidence related to the interviews and to Sir Ian's role in the decision-making process and it is convenient to deal with those criticisms in that context.

(iv) Hearsay evidence and the 'Ocean Frost'

31. I come next to two rather more substantial criticisms, namely, that the judge failed to give sufficient weight to the contemporaneous documents, preferring instead the recollections of the witnesses, and that she failed to approach the hearsay evidence in the right way. The criticisms are made in respect of many of the same aspects of the evidence and it is convenient to consider them together.

32. As far as the first is concerned, every experienced judge is well aware that contemporaneous documents, where they exist, often provide a better insight into the facts than the unaided recollections of witnesses, especially when there has been any substantial lapse of time since the events in question. The point was famously made

by Goff L.J. (as he then was) in *Armagas Ltd v Mundogas S.A. (The 'Ocean Frost')* [1985] 1 Ll. Rep. 1 at page 57 when dealing with the allegation of fraud he said:

> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."

33. Although Lord Goff referred specifically to cases involving fraud, I quite accept that what he said may hold good for other cases, but I am unable to accept that what is essentially a statement of practical good sense can be elevated into something approaching a rule of law. That was in effect what Mr. Warby sought to do, submitting that the judge erred by failing to adopt what he described as "the correct approach" of preferring the evidence of the contemporaneous documents to the evidence given by the witnesses. In my view there is no correct approach other than to weigh up all the evidence and make findings that are properly supported by it. If the judge's findings of fact are not supported by the evidence, then of course they are liable to be set aside, but that is a different matter.

34. This part of Mr. Warby's submissions focused mainly on two contemporaneous documents, a note sent on 27th November 2002 by Andy Kinch of the Procurement Department to a member of Sir Ian Blair's staff (the "Kinch note") and an internal note made by Hilary Walker (also employed in the Procurement Department) on 3rd December 2002 following the presentation by Impact Plus. Neither Mr. Kinch nor Ms Walker was called as a witness because, it was said, even when they gave evidence to the inquiry conducted by Sir Ronald Flanagan into certain aspects of Sir Ian Blair's conduct ("the Flanagan Inquiry") in 2008, they had no independent recollection of the events in question.

35. The Kinch note confirmed that arrangements had been made for Sir Ian Blair to meet representatives of the two companies which had submitted tenders and asked that following the interviews he record the outcomes to enable the Procurement Department to award the contract to the preferred supplier and finalise the contract terms. Ms Walker's note, made on 3rd December after the interviews had been completed, recorded that Sir Ian and Ms Beaton were confident that Impact Plus could undertake the task, although Ms Beaton thought that careful management would be needed to ensure that the company did not exceed the brief in the second phase and generate a level of work not envisaged in the original requirement. A recommendation was made to offer the contract to Impact Plus, subject to receipt of satisfactory references.

36. Mr. Warby submitted that these two documents tended to show that Sir Ian Blair interviewed the two candidates with a view to deciding for himself which should be

chosen, or at least influencing that decision. The judge considered that the documents themselves provided no more than slender support for that conclusion, but she also referred to other parts of Ms Beaton's and Ms Walker's statements, which in her view were capable of casting them in a different and even more benign light. In particular, she relied on Ms Beaton's evidence that Sir Ian had needed to be satisfied that he could work with whoever was appointed, that she had not been influenced by anyone in reaching her conclusion, that she would expect the most senior person in the organisation making the tender to attend a presentation of that kind, that Impact Plus had provided a far better proposal than the other bidder, and that she would not have been comfortable if Sir Ian Blair had not attended the interview, since the consultant would be reporting to Sir Ian as well as herself.

37. Ms Walker recalled that before any tenders had been submitted Sir Ian Blair had disclosed that Mr. Miller was a friend of his and had said that he could not take part in the initial evaluation of them. She also said that Sir Ian had not influenced her in any way, nor had he taken part in formulating the recommendation, which was handled by Ms Beaton, Mr. Atherton and herself.

38. Mr. Warby complained that the judge had preferred the evidence of Ms Beaton and Ms Walker to that of the two contemporaneous documents, but the position was not as straightforward as he sought to suggest. Each of the documents was open to different interpretations and had to be read in context. One of the striking features of the case was that the appellant called no one to give evidence in person, preferring to rely instead on contemporaneous documents and statements made in 2008 in connection with the Flanagan inquiry. The appellant was quite entitled to do that, but it meant that all the evidence on which it relied was necessarily of a hearsay nature. In the event, none of those who had made statements on which the appellant relied were called to give evidence in chief and it was no part of Mr. Miller's duty to require them to be called for cross-examination. In those circumstances the judge was prepared to give their evidence less weight than might otherwise have been the case and that in turn led to some of the criticisms of her approach.

39. Having considered the evidence as a whole, the judge described as problematic the nature of the hearsay evidence relied on by the appellant, having earlier drawn attention to the fact that much of it represented what she called "selective snippets" taken out of context. That can often be a problem, because context is so important. Even contemporaneous documents have to be read and understood in context and in many cases that context can be supplied only by those who were directly involved. The documents were not unambiguous and the judge had to decide what significance could properly be attached to them in the context of the facts as a whole.

40. Mr. Warby also criticised the judge for treating those parts of Ms Beaton's and Ms Walker's statements on which the respondent relied as capable of establishing the truth of what they had said, rather than merely neutralising the parts on which the appellant himself relied. In my view that is an arid complaint. Section 2(4) of the Civil Evidence Act 1995 makes it clear that a failure to give a hearsay notice as required by section 2(1) does not render the statement inadmissible as evidence of the truth of its contents, although it may adversely affect the weight which the court attaches to it. In deciding what weight to give to any particular piece of hearsay evidence the court is required by section 4(1) to have regard to any circumstances which may affect its reliability, but a failure to give specific consideration to each of

the various circumstances set out in section 4(2) should not, in my view, normally be treated of itself as grounds for impugning the judge's decision. A mechanistic approach of that kind is neither necessary or desirable. Given the nature of the appellant's case and the evidence before the court, I do not think that the judge can be criticised for failing to give greater weight to the documents or for making findings of fact based partly on the statements of Ms Beaton and Ms Walker.

(v) Failure to consider evidence

41. Mr. Warby's next criticism was that the judge failed to have regard to certain important pieces of evidence when dealing with the question whether Sir Ian Blair played any part in the selection of the consultant. In support of this submission Mr. Warby managed to identify eleven items of evidence which he said the judge had overlooked, but none of them could in my view properly be described as important and some were barely of any relevance at all. For example, he referred to an email sent by Ms Beaton to Mr. Atherton on 21st October 2002 in which she said that "the final decision is the Deputy's", but when read as a whole it is clear that she was referring to the manner in which the consultant would be expected to report, not to the choice of consultant. Another example was an email confirming that Sir Ian had expressed a wish to meet the two final contenders. Since there was other evidence that Sir Ian had asked to meet them, I do not think that it added anything of significance. Mr. Warby also referred to notes made by Ms Walker following the two interviews in which she referred to the assessment as having been made by Ms Beaton and Sir Ian. That, together with other evidence, could be taken as indicating that Sir Ian took an active role in the interviews and the assessment of the rival candidates, but it does not go far towards establishing that he had a significant role in deciding which candidate should be offered the contract. Other items of evidence identified by Mr. Warby seem to me to be even weaker, in particular his reliance on the absence of any record of the nature of Sir Ian Blair's involvement in the interviews. Perhaps his best example was a memorandum from Sir Ian to Ms Beaton dated 4th April 2003 (a year after the contract had been awarded to Impact Plus), in which he drew attention to his friendship with Mr. Miller and said that if Impact Plus were to be asked to carry out any additional work there should be a system in place to ensure that "that decision is no longer mine". The use of that phrase was said to imply that Sir Ian had made the decision to employ Impact Plus in connection with the C3i programme. The judge was well aware of the memorandum, but gave it little weight in the absence of any evidence from those who had been involved in the decision-making process and could speak directly about Sir Ian's role. In my view, the argument that the judge overlooked or failed properly to take into account important items of evidence is not made out. At best, the various instances on which Mr. Warby relied were either equivocal or amounted to no more than pointers of very little weight.

Taking irrelevant matters into account

42. In paragraphs 108-109 the judge said:

> "108. However, all the matters on which the Defendant relied must be considered in <u>their</u> proper context, and in the light of what the evidence did not show, as well as what it did.

> 109. To take some examples. There is no evidence that Impact Plus was not well-suited for the role to which it was appointed. The evidence is that it was: that is that it had the expertise, resources and experience to undertake the work on C3i which it offered and was engaged to undertake, and that it had already established a good reputation within the MPS by the time it was invited to tender for the Programme Conscience contract. There is no evidence that anyone else invited to tender was better suited to the role. The evidence is that the only other company which tendered regarded the work as "outside the envelope"; and in any event its presentation and tender was assessed by the relevant procurement personnel unfavourably in comparison to that put forward by Impact Plus. In other words, the evidence is that Impact Plus was clearly the better candidate and won the tender on the merits (rather than being favoured regardless of its ability to undertake the work and because of Mr Miller and Sir Ian Blair's friendship). There is no evidence, or none that satisfies me, that Sir Ian Blair played any part in the initial sift, or indeed in the ultimate selection of Impact Plus. The evidence such as it is, is that the procurement process was followed after the meeting. There is no evidence that Mr Miller or Sir Ian Blair concealed their friendship from those involved in the process; on the contrary, it was clearly declared to the MPS and the MPA before the interviews took place. A large number of individuals from the MPS and MPA, each with different roles and responsibilities, were involved in detail in the tendering process and award of contracts. The evidence does not support any suspicion that any of them were a party to an arrangement by Sir Ian Blair or Mr Miller for that matter, to side step or ignore the proper procedures to help Impact Plus get the contract. It is not suggested that the work Impact Plus ended up doing for the MPS was unnecessary, or that the fees charged by Impact Plus were inappropriate for the work it undertook or that its work was not valuable to the MPS. To the contrary. The evidence is that Impact Plus was appropriately paid for the work it did, and that it did a good and valuable job."

43. Mr. Warby criticised that passage on the grounds that the judge took into account a number of matters that were not relevant to the question of reasonable suspicion, such as the suitability of Impact Plus for the work, the fact that no better qualified company had tendered, that there was no suggestion that it had carried out work that was unnecessary or that it had charged too much. However, in my view the criticism is misplaced. Earlier in paragraph 108 the judge had recorded Mr. Warby's submission that it would not be right to view matters in isolation. That was a submission she

accepted, but with the qualification that the matters on which the appellant relied had to be considered in their proper context and in the light of what the evidence did not show, as well as what it did. She began paragraph 109 by giving some examples, including those of which the appellant now complains. They are no more than illustrations of the point she was making, namely, that some circumstances which, if they had existed, might have lent additional support to the appellant's case, had not been established.

Overall approach

44. Mr. Warby's concluding submission was that by the end of the trial the appellant had done enough to establish the truth of the imputation and in my view, despite the many and various individual criticisms advanced in the course of argument, that is the way in which the case had to be put if the appeal were to succeed. It is necessary to remember that a *Chase* Level 2 imputation involves an allegation that the claimant has by his conduct brought suspicion upon himself. That is a matter to be judged objectively by reference to the facts, taken as a whole, as they were at the time of publication and as they would be viewed by an ordinary reasonable person. In this case the allegation concerns only Mr. Miller; it was his conduct, rather than that of Sir Ian Blair, that had to be considered. In the course of the judgment the judge from time to time considered the inferences that could, or could not, properly be drawn from particular primary facts and in doing so she may occasionally have expressed herself in a way which suggested that she was making findings about what had occurred rather than what suspicion, if any, the primary facts would support. For example, when dealing in paragraph 30 with Ms Walker's note of 3rd December 2002 she said:

> "It is not disputed that Sir Ian Blair was present during the interview, but putting to one side for the moment whether this evidence falls foul of the conduct rule, this evidence seems to me to be a very slender and unsatisfactory basis for establishing that Sir Ian Blair made or took part in the decision and falls very far short of persuading me that he did so."

45. Again, in paragraph 31, when dealing with the Kinch note, she said:

> "I do not consider much, if anything can be read into it, in particular in the absence of any explanation from Mr Kinch as to why he said what he did."

46. The judge was well aware of the principle that in seeking to justify a *Chase* Level 2 imputation both parties are entitled to rely on the facts as they were at the date of publication, whether they knew of them or not. It is not surprising, therefore, that she made findings about the circumstances surrounding the award of the contract to Impact Plus. It may be that some of her findings related to matters that were barely, if at all, relevant to the question whether Mr. Miller had conducted himself in such a way as to give rise to a reasonable suspicion that he was willing to benefit from misconduct and cronyism on the part of Sir Ian Blair, but I am not persuaded that she lost sight of it. In paragraphs 22-23 of her judgment the judge summarised her conclusion in terms which make it clear that she had the correct principles well in mind and in paragraph 108 she accepted that the facts had to be viewed as a whole and in their proper context. Reading the judgment as a whole, I am left with the clear

impression that this appeal has been based largely on the way in which the judge expressed herself when analysing individual aspects of the evidence and the inferences that could or could not be drawn from them. In the end, however, I am left in no doubt that she approached the matter in the right way, identifying the relevant facts and asking herself whether, taken as a whole, they gave rise to a reasonable suspicion of the kind alleged.

Overview

47. When deciding whether the judge reached a conclusion that was unsustainable on the evidence before her it is helpful to stand back and consider the matter afresh, all the more so given Mr. Warby's submission that this court was as well placed to determine the matter as the judge. The observable facts relating to Mr. Miller's conduct were fairly limited and in the main not in dispute. Placed in their proper context they can be summarised as follows:

(i) Mr. Miller and Sir Ian Blair were long standing friends.

(ii) Impact Plus, a company which had been established by Mr. Miller and of which he was managing director, had developed a consultancy system designed to provide advice and support to persons responsible for overseeing major projects involving a substantial element of information technology.

(iii) On his appointment as Deputy Commissioner in February 2000 Sir Ian Blair became responsible on behalf of MPS for the oversight and delivery of the C3i programme.

(iv) On a social occasion in 2000 Mr. Miller warned Sir Ian that he might encounter difficulties in ensuring that the C3i programme, then a PFI project, was delivered successfully.

(v) In the course of a meeting with Ms Beaton in 2000, the purpose of which was to establish broader business contacts with MPS, Mr. Miller mentioned that he was a friend of Sir Ian Blair.

(vi) In 2001 the C3i programme ceased to be a PFI project and came under the direct control of MPS.

(vii) In September 2002 Sir Ian Blair made a telephone call to Mr. Miller out of the blue, in the course of which he said that he wanted to find a consultant to assist him in overseeing the C3i programme and asked Mr. Miller whether he could recommend any organisations capable of meeting his requirements. Mr. Miller told him that Impact Plus could provide consultancy services of that kind. Sir Ian told Mr. Miller that invitations to tender would be issued in due course and that an invitation would be sent to Impact Plus.

(viii) Advance notice of a future invitation to tender given in such general terms would not normally give a potential bidder any practical advantage in producing a tender and did not do so in this case.

(ix) On 28th October 2002 the Procurement Department of MPS sent invitations to tender for the provision of specified consultancy services to four companies,

one of which was Impact Plus. The invitation stated that bids should be received by 7th November 2002 and that any enquiries should be directed to Mr. Kinch.

(x) Impact Plus considered that the specification in the invitation to tender was inadequate to meet the needs of MPS. As a result, Mr. Miller telephoned Sir Ian Blair to seek his approval for the submission of a different bid. Sir Ian cut him short and told him to speak to Mr. Atherton. Mr. Samphire spoke to Mr. Atherton about submitting a revised tender. He told Mr Atherton that the MPS specification did not adequately cover the work Impact Plus believed was necessary. Mr. Atherton then allowed Impact Plus to submit an alternative bid which he made clear would be assessed on its merits. Impact Plus submitted a bid proposing additional work at greater cost. It was commonplace for consultants in that field to submit a bid for additional work or work other than that specified in the invitation to tender, if the specification was thought to be inadequate.

(xi) The only other bidder, Willis, submitted a bid based on the specification in the invitation to tender. It was not told that Impact Plus had submitted a modified bid.

(xii) On 12th November 2002 the bids were evaluated by Mr. Atherton. In his view both met the necessary requirements, but each had disadvantages: the bid from Willis stuck rigidly to the specification, but did not demonstrate added value and intellectual input; the bid from Impact Plus was significantly over-engineered and was difficult to support in terms of value. Mr. Atherton suggested that Sir Ian meet both suppliers.

(xiii) Interviews were arranged for 28th November 2002 (Willis) and 3rd December 2002 (Impact Plus). On 25th November 2002 Sir Ian Blair telephoned Mr. Miller and told him that he should attend the interview with Impact Plus.

(xiv) Sir Ian Blair, Ms Beaton and Ms Walker were present at both interviews, which Sir Ian chaired. Mr. Miller and Mr. Samphire attended the interview on behalf of Impact Plus. It was not unusual for Mr. Miller to attend a presentation to an important potential client.

(xv) The contract was awarded to Impact Plus on terms which limited the amount payable in respect of the first phase.

48. I have omitted from that summary two matters to which the parties attached some importance. The first, on which Mr. Miller placed some reliance, is the fact that on 26th November 2002 Sir Ian Blair wrote a memorandum to Mr. Peter Martin, Treasurer of the Metropolitan Police Authority, informing him of his intention to appoint a consultant to assist with the C3i programme and of the fact that one of the two candidates for appointment, Impact Plus, was owned and run by his friend Mr. Miller. The second, to which the appellant attached importance, concerns the involvement of Sir Ian Blair in the decision to offer the contract to Impact Plus. Neither involved conduct of any kind on the part of Mr. Miller, nor is there any reason to think that he was aware of them. He may well have assumed (whether correctly or not does not matter) that Sir Ian would have some influence over the choice of

consultant, but that was inherent in the nature of the exercise. Neither provides any part of the context in which any of Mr. Miller's subsequent actions falls to be viewed. Nor, for that matter, when taken in the context of the other findings, do they provide reasonable grounds for suspecting that Sir Ian Blair was willing to misconduct himself in order to benefit Mr. Miller and Impact Plus.

49. In my view the judge reached the right conclusion. The observable facts at the date of publication did not provide reasonable grounds for suspecting that Mr. Miller was a willing beneficiary of improper conduct and cronyism on the part of Sir Ian Blair. I would therefore dismiss the appeal.

Lord Justice Lloyd Jones :

50. I agree.

Lord Justice Maurice Kay :

51. I also agree.